IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.3.2006

CORAM:

THE HONOURABLE MR.JUSTICE C.NAGAPPAN

A.S.No.1186 of 1990

1.R.Sridharan

2.R.Balasundaram alias
Balasubramaniam

3.R.Narendra Mahesh alias
Mahesh Kumar (major)
(3rd Appellant declared as major
vide order of Court dated 3.3.2006
made in C.M.P.No.1127/2006) .. Appellants (Plaintiffs)

-Vs-

1.Ammaniammal
2.P.Rajagopal
3.Ranganayagi
4.Brinda Devi
5.Ashwinikumari .. Respondents (Defendants)

Appeal against the judgment and decree, dated 19.12.1988, made in O.S.No.68 of 1982 (O.P.No.198 of 1981) on the file of the Court of Subordinate Judge, Coimbatore.

For appellants : Mr. N.Varadarajan

For respondents : Mr.V.Natarajan
for R2.

JUDGMENT

The appeal is preferred against the judgment and decree dated 19.12.1988 made in O.S.No.68 of 1982 on the file of the Court of Subordinate Judge, Coimbatore. The appellants herein are the plaintiffs in the suit.

2.The appellants filed the suit seeking for a decree for cancellation of registered sale deed dated 11.5.1972 executed by the defendants 1 and 2 to the extent of the plaintiffs 9/16 th share value and for partition of the suit properties into sixteen equal shares and allot nine shares to the plaintiffs and for costs. The

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case of the plaintiffs is that they are the sons of first defendant who as kartha of joint family was looking after the ancestral lands measuring a total extent of 13 acres and 28 cents in two villages and the lands were fertile yielding a net income of more than Rs.15,000/- per year which was sufficient for maintaining the family and the first defendant was leading a wayward, immoral life and did not look after the cultivation properly and the lands were leased to third defendant for annual lease amount of Rs.5,000/- in the year 1972 and he had not paid the lease amount from the year 1978 and later the plaintiffs were told that the lands have been purchased by the third defendant by sale deed dated 11.5.1972 for a sum of Rs.65,000/- from the defendants 1 and 2. According to the plaintiffs, the first defendant in collusion with the second defendant had created a sham and nominal document to get illegal gain and collusively executed the sale deed for paltry sum of Rs.65,000/- in detriment to the legitimate rights and interest of the plaintiffs and the first defendant's father died in the month of Chittarai in 1956 prior to the coming into force of Hindu Succession Act and the joint family properties were shared only by the first defendant and his three sons namely, the plaintiffs and the second defendant had no share in the suit properties and the first defendant died on 17.11.1987 during the pendency of the suit and his widow and two daughters are added as defendants 4 to 6 and no relief is claimed against them. The further case of the plaintiffs is that the sale deed was not supported by consideration and there was no legal necessity to alienate the suit lands and both the first and third defendants were aware even at the time of sale that no valuable property could be acquired for a sum of Rs.25,000/- for the minor sons at that time. The retention of such a sum itself is a hoax calculated to lend legitimacy to the transaction which was otherwise and the third defendant is not paying any interest on the sum retained by him for the benefit of minors and for acquisition of property for the past many years and the alienation made by the defendants 1 and 2 could only bind their 7/16th share in the suit properties and not 9/16th share belonging to the plaintiffs and liable to be cancelled in respect of plaintiffs share and partition has to be effected. Hence the suit.

3. The second defendant in her written statement as well as additional written statement has denied the averments in the plaint and has stated that the father of the defendants 1 and 2 viz., Rengappa Naidu died on 4.5.1956 and on that date, the succession to his estate was governed by the provisions of Central Act 18 of 1937 and his heirs include the widow Ellammal and she died on 11.12.1968 and succession to her estate was governed by Central Act 30 of 1956 and the second defendant was also a Class I heir, entitled to 1/4th share and the plaintiffs are not entitled to question the sale by the second defendant of her share in the properties and the third defendant was never a lessee of the suit properties and the alienation was made for binding debts and the price paid was fair.

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4. The third defendant in his written statement as well as in the additional written statement has admitted that the suit properties were the ancestral properties of the first defendant, in which, both defendants 1 and 2 have definite shares and according to him, the first defendant borrowed money for improving the lands and for digging a well and the debts were mounting and in order to discharge the antecedent debts, the first defendant was forced and compelled to sell the suit property from saving the family from incurring further loans and getting ruined and the first defendant was a prudent and ordinary man and no vices can be attributed to his character and the third defendant was never inducted as lessee in the suit property and to the knowledge of the plaintiffs, he purchased the suit property under sale deed dated 11.5.1972 for a sale consideration of Rs.65,000/- from the defendants 1 and 2 and the minor plaintiffs were duly represented by their father who was the natural guardian and out of the sale consideration, Rs.40,000/- was received by the first defendant to discharge the family debts and the third defendant was asked to retain the remaining Rs.25,000/- to enable the vendors to purchase some other properties for the benefit of the plaintiffs and till then, the third defendant agreed to pay interest thereon at 10% per annum and in fact paid by way of interest a sum of Rs.12,800/- and the sale effected by defendants 1 and 2 in favour of him was for legal, binding necessity and for the benefit of minors as well and the antecedent debts are not tainted with any immorality or illegality and he refused to part with the sum of Rs.25,000/- retained under the sale deed excepting for the purpose specified in the document and that has triggered the filing of the unjust and unholy suit. It is his further case that he has spent a sum of Rs.70,000/- towards deepening the well, laying two bores and for putting channel and planted about 250 coconut trees and he is entitled to compensation if a decree is passed.

5. The Trial Court framed 9 issues and the first plaintiff examined himself as P.W.1 and examined P.W.2 on his side and marked Exs.A1 to A10 and the third defendant examined himself as D.W.1 and examined D.Ws.2 to 7 on the side of the defendants and marked Exs.B1 to B43 and Exs.C1 to C3 were also marked and the Trial Court, on a consideration of oral and documentary evidence, held that the plaintiffs have not proved the alleged acts of immorality and illegality on the part of the first defendant and the first defendant sold the suit properties in order to discharge the antecedent debts for family necessity and the sale deed cannot be set aside as invalid and the suit is barred by limitation and the plaintiffs are not entitled for the reliefs prayed for and dismissed the suit with costs. Aggrieved by the judgment and decree, the plaintiffs have preferred the present appeal. The first respondent-Ammaniammal, who is the second defendant in the suit, did not enter appearance in person or through counsel and her name is printed in the cause list. Notice to Respondents 3 to 5

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is dispensed with since they were exparte in the trial Court. For the sake of convenience, in this Judgment, the parties are described as arrayed in the suit.

6. The points for determination in this appeal are:

> "1.Whether the sale deed dated 11.5.1972 is valid and binding on the plaintiffs.
>
> 2.Whether the plaintiffs are entitled to partition and allotment of separate share, if so, what share.
>
> 3. Whether the plaintiffs are entitled to the relief of cancellation of sale deed to the extent of their share.
>
> 4. Whether the third defendant is entitled to the claim of improvements.
>
> 5. Whether the suit is barred by limitation."

POINTS 1 to 3:

7. Admittedly, the suit properties measuring 13 acres and 28 cents are ancestral joint family properties of Rengappa Naidu who died on 4.5.1956 prior to coming into force of Hindu Succession Act, leaving his widow Ellammal and his son and daughter viz., defendants 1 and 2. As per the provisions of Central Act 18 of 1937, the legal heirs were son, grandsons and widow and widow Ellammal died on 11.12.1968 and succession to her property was governed by Central Act 30 of 1956 and the second defendant was also a Class I heir of her. Hence defendants 1 and 2 were sharers to the suit properties. The first defendant for himself and on behalf of his minor sons viz., the plaintiffs and the second defendant for herself sold the suit properties by a registered sale deed dated 11.5.1972 to the third defendant for a sale consideration of Rs.65,000/-. Ex.B3 is the registered sale deed dated 11.5.1972 and Ex.A1 is its registration copy. After attaining majority, the plaintiffs have filed the present suit in the year 1981 seeking for cancellation of the sale deed to the extent of their 9/16 share value and for partition and separate possession of their share.

8. The learned counsel for the appellants, in his memo dated 20.1.2006, has stated that each plaintiff is entitled to 1/8 share and put together, they are entitled to 3/8 shares only in the suit properties. This quantum of shares is also accepted by the learned counsel for the respondents. Hence it is determined that the plaintiffs are entitled to 3/8 shares only in the suit properties.

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9. The plaintiffs have stated in the plaint that the sale deed was not supported by consideration and there is no legal necessity to alienate the suit lands and the debts quoted in the sale deed are sham and nominal and they are incurred and tainted with immorality and those debts are not binding on the plaintiffs and the trial Court, on the basis of the evidence adduced, concluded that the act of immorality or illegality attributed to the first defendant has not been established or proved by the plaintiffs. The learned counsel for the appellants represented that he is not canvassing the correctness of the above finding and he did not press the plea of antecedent debts being tainted with immorality or illegality made in the plaint.

10. The learned counsel for the appellants further contended that as stated by him in the memo, out of the total sale consideration of Rs.65,000/-, a sum of Rs.40,000/- went in discharge of antecedent debts and the alienation could be supported on the ground of necessity to that extent and he confined his argument only to the extent that the sale could not be supported for the remaining sale consideration of Rs.25,000/- on the ground of benefit to the family. In view of the above submission, it is determined that the antecedent debts amounted to Rs.40,000/- and part of sale consideration went in discharge of the same.

11. The only question now remains for consideration is as to whether the sale in respect of the balance of sale consideration of Rs.25,000/- could be supported either on the ground of necessity or benefit of the family. There is absolutely no evidence of any other debt and there is nothing to suggest that the parties conceived of the sale in so far as the remaining sale consideration as an inevitable necessity. As per the recital in the sale deed, the vendee viz., the third defendant was asked to retain the remaining sale consideration of Rs.25,000/- till the vendors purchase some other properties in the names of minor children of the first defendant and till then, the third defendant agreed to pay interest thereon at 10% per annum. The above recital makes it clear that the sale with regard to consideration of Rs.25,000/- is only on the ground of benefit of the family.

12. The learned counsel for the appellants contended that in case of alienation for the purpose of family benefit, the alienee has to prove that the sale consideration was actually utilised for the purpose of purchase of other lands for the benefit of the family and in the absence of such evidence, the sale cannot be taken for the benefit of the family and mere retention of the amount in the hands of the alienee for the purchase of the lands would not suffice and there must be actual proof of purchase of other lands. He further contended that the plaintiffs 3/8 shares in the sale consideration would roughly come to Rs.25,000/- and their share in the suit properties would be approximately 5 acres and there is no

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need for the kartha to sell those lands either for necessity or for the benefit of the family and the sale is not binding on the minors and the plaintiffs are entitled for the relief sought for in the suit. In support of his contention, he relied on the following decisions.

13. A Division Bench of this Court in the decision in SENGODA GOUNDAN v. MUTHUVELLAPPA GOUNDAN (AIR 1955 Madras 531), considered the question as to whether the alienation could be justified on the ground of benefit to the family when the minor's share of the consideration had been left with the vendee as per the recital of the sale deed and laid down the law as under:

> "In the absence, therefore, of any proof of utilization of the sale proceeds in the purchase of other property for the family, we must hold that the alienations were not for the benefit of the family. In this view, it is immaterial whether the plaintiff's share of the consideration was received by the mother in any of these transactions or whether the plaintiff's share was retained by the respective vendees. We agree with Subba Rao, J. that the alienations were not for the benefit of the family and therefore were not binding on the plaintiff."

14. In the decision in A.SUBRAMANIAN ASARI v. JAYADEVAN NAIR AND OTHERS (98 L.W. 215), a Division Bench of this Court followed the above decision and incorporated the above referred to para of the Judgment and held as follows:

> "Therefore the view taken by Ramanujam, J., that since the 9th defendant had not proved the utilisation of 6,065 fanams for purchase of another item of property for the benefit of the family, the sale cannot be held valid, is fully in accordance with law."

15. A learned single Judge of this Court in the decision in KRISHNASWAMI NAIDU v. VELUMANI & OTHERS (1974 T.L.N.J. 139) considered the question as to whether the sale can be held to be for the benefit of the joint family, even though the sale proceeds have not been utilised for the purchase of better lands and observed thus:

> "But the courts have always made a distinction between an alienation made for legal necessity and one made for the benefit of the family. In cases coming under the former category, the alienation is upheld even if the sale consideration has not been utilized as was expected of the manager at the time of entering into the transaction as the alienee need not look to the proper application of the sale proceeds. But as already stated, the courts have

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consistently taken the view that in the latter type of cases, the alienee has to prove that the sale consideration was actually utilised for the purpose of purchasing other lands for the family and that in the absence of such evidence the alienation cannot be taken to be beneficial for the family."

16. Per contra, the learned counsel for the second respondent contended that the amount of Rs.25,000/- retained with the vendee viz., the third defendant, is the sale price amount and not reserved amount at the disposal of the vendee and the sale is already over and the evidence adduced would prove the payment of interest by the vendee and there is no plea in the plaint that some other property was not purchased and the vendee is always ready to pay the amount and it is not obligatory on the alienee to prove that the necessity was fulfilled in accordance with the recitals contained in the sale deed and it is not necessary for him to show that every bit of consideration was actually applied for meeting the family necessity and the first defendant was alive on the date of filing of the suit and he remained exparte and encouraged the litigation as 'suthrathari' and the suit is a collusive one. In support of his contention, he relied on the following decisions:

17. The Privy Council has observed in SRI KRISHNADAS v. NATUHRAM AND HIMMAT RAI v. DIN DAYAL (A.I.R. 1927 P.C. 37 and 1121) that what the alienee is required to establish is legal necessity for the transaction, it is not necessary for him to show that every bit of the consideration was actually applied for meeting family necessity and he can rarely have the means of controlling and directing the application of the money paid by him unless he enters into the managements himself.

18. A Division Bench of this Court in the decision in SANTANAVENUGOPALAKRISHNAN AND OTHERS v. K.V.VENUGOPAL AND OTHERS (1976 II M.L.J. 134) held as follows:

"Antecedent debt has a special signification. If the debts are incurred for paying off debts already in existence, then it will be normally understood as an occasion in which an antecedent debt is being discharged. It is therefore, essential that in such connections wherein alienations are made so as to pay off antecedent debts in the sense of debts which are recited in a registered and old document as existing debts of the family, the minor should be in a position to bring home to the Court that there was no occasion or there could have been no occasion for the father-manager or any other manager of the joint family to involve himself in such entrepreneurship. ….. Further in cases like this, it would be a practical impossibility for the alienee who is

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brought to the threshold of the Court on the facts adverted by the minor challenging coparcener to prove that the consideration which passed under one or other alienations made by the father-manager or the manager was rightfully or properly utilised by their vendors. It would be unreasonable to expect such meticulous proof of appropriation and treatment of such consideration nearly 15 or 20 years after the date of such alienation.

19. In K.VENKATASUBRAMANIAM v. S.ARTHANARISWARI CHETTIAR AND OTHERS (1980 T.L.N.J. 417), a Division Bench of this Court held as follows:

> "In paragraph 245 at page 308 of Mulla's Hindu Law, Fourteenth Edition, the several cases in which the sales were upheld unconditionally, though part of the sale consideration was not established to be for discharge of antecedent debt have been collected. The principle that is deducible from these decisions is that the mere fact that part of the price was not proved to be applied for the purpose of necessity would not invalidate the sale, as the purchaser was only expected to make enquiries about the existence of the antecedent debts and that he was not bound to see the application of the price. But the binding purpose must have formed a substantial part of the transaction. ….. It may be that in very many cases it would not be possible to alienate just the particular part of the family property in order to discharge the binding debts. It would, therefore, be necessary to sell the property for the available price and discharge substantially the antecedent debts out of the sale consideration, the balance being utilised for family purposes. But this is not such a case. The consideration of the antecedent debts being less than one-half of the actual consideration. The alienation cannot be supported as binding on the family, and will not bind the third defendant."

20. A Full Bench of the Allahabad High Court in the decision in JAGAT NARAIN AND ANOTHER v. MATHURA DAS AND OTHERS (A.I.R. 1928 Allahabad 454) held that the degree of prudence of the family manager in effecting an alienation for the benefit of the estate would be the prudence which an ordinary man would exercise with the knowledge available to him; and that the transaction would have to be judged not by its results, but by what might have been expected to be its results at the time it was entered into.

21. Insofar as alienation for legal necessity is concerned, all that alienee will have to prove is the existence of the necessity and it is not obligatory on him to prove that necessity

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was fulfilled by proper application of the sale proceeds since he cannot effectively control and direct the actions of the vendor.

22. In the present case, as already seen, the sale in respect of consideration of Rs.40,000/- could be supported on the ground of necessity and the sale for the balance of consideration of Rs.25,000/- towards the minor's share, has to be justified on the ground of benefit of the family even as per the recitals in the sale deed. The vendee viz., the third defendant, was asked to retain the remaining sale consideration of Rs.25,000/-, towards the minor's share, to enable the vendors to purchase some other properties for the benefit of minors in their names and till then, the third defendant agreed to pay interest thereon at 10% per annum. The plaintiffs in the plaint have stated that the third defendant is not paying any interest on the sum retained by him for the benefit of the minors and for acquisition of property for the past many years. In the written statement, the third defendant has stated that he has paid a sum of Rs.12,800/- towards interest to the first defendant by obtaining receipts and when he was not willing to part with the money retained excepting for the purpose mentioned in the sale deed, the plaintiffs have filed the unjust suit. Hence, there are pleadings with regard to purchase of some other property and the contention of the learned counsel for the second respondent that no plea was taken in the plaint, is not correct.

23. The third defendant in his cross-examination as D.W.1 has stated that he paid a sum of Rs.12,800/- to the first defendant as interest on the retained amount and Exs.B33 to B36 receipts are evidencing the same. Admittedly, after 1980, the vendee viz., the third defendant has not paid the interest amount till today. No other property has been purchased in the name of minors utilising the retained amount.. The learned counsel for the second respondent contended that there is no obligation cast on the third defendant to effect the purchase on behalf of minors and he was only asked to retain the amount and to pay it as and when some other property is purchased in the name of minors and the third defendant is always ready to handover the amount for that purpose. The question is as to whether the alienation of minor's share was for the benefit of the family. In the absence of any proof of utilization of the sale consideration of Rs.25,000/- in the purchase of some other property for the minors, it must be held that the alienation of the minor's share was not for the benefit of the family. In that view, it is immaterial whether the minor's share was retained with the vendee viz., the third defendant. Therefore, the sale deed in respect of the minor's 3/8 shares is not binding on the plaintiffs and liable to be cancelled. The plaintiffs are also entitled to partition and separate possession of 3/8 shares in the suit properties. The findings of the Trial Court in this regard are liable to be set aside. The Point Nos.1 to 3 are answered accordingly.

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POINT No.4:

24. The third defendant in his written statement has claimed that he has improved the lands by spending a sum of Rs.70,000/- towards deepening the well, laying two bores and for putting channel and has planted 250 coconut trees by incurring an expense of Rs.10,000/-. No document has been filed to prove the alleged improvements and no independent witness has been examined. The third defendant, in his cross-examination as D.W.1, has stated that he has not maintained accounts for digging and deepening the well and for laying the bores and in the very next sentence, he has stated that he has got accounts for deepening the well but he has not filed the same. Nothing prevented the third defendant from seeking for an appointment of Advocate Commissioner to visit the suit property for the purpose of proving the improvements and that has not been done. Except the oral testimony of the third defendant, no other evidence is available on record for the claim of improvements. In the absence of proof of improvements made, it has to be held that the third defendant is not entitled to the claim. Point No.4 is answered accordingly.

POINT No.5:

25. The finding of the Trial Court that the suit is barred by limitation since it was not filed within three years from the date of the knowledge of the sale as per Section 59 of the Limitation Act, is erroneous and cannot be sustained. The correct provision of law applicable under the Limitation Act is only Article 109 and the suit having been filed in the year 1981, within 12 years from the date of sale viz., 11.5.1972, is within time. Point No.5 is answered accordingly.

26. The appeal is allowed and the judgment and decree of the Trial Court are set aside and there shall be a decree for cancellation of the sale deed dated 11.5.1972 executed by the defendants 1 and 2 to the extent of the plaintiffs 3/8 share value and also a preliminary decree is passed for partition of the suit properties and separate possession of 3/8 shares of the plaintiffs with costs throughout. The plaintiffs shall pay Court fees in the suit as well as in the appeal. Time three months.

Vks

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Sub Asst.Registrar

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To

1.The Subordinate Judge,
Coimbatore.

2.The Section Officer,
V.R.Section, High Court,
Madras. (For sending records forthwith)

3. The District Collector,
Madras (For collecting court fees dues)

1 cc to Mr.N.Varadarajan, Advocate, SR.12556
1 cc to Mr.V.Natarajan, Advocate, XSR.12275

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